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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1951.

No. 723

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY, INC., a Corporation,

Petitioners,

vs.

HARWOOD A. WHITE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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SUBJECT INDEX

PAGE

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit 1

I.

Summary statement of the matter involved 1

II.

Basis for jurisdiction of this court 2

III.

History of the literary properties involved 3

IV.

Statement covering the litigation 4

V.

The question presented 6

VI.

Reasons for allowance of writ 7

VII.

Conclusion 8

Brief in support of petition 11

I.

Statutory provisions sustaining jurisdiction 11

II.

Dates of opinions, judgments, and petition for rehearing below 11

III.

Argument 12

IV.

Conclusion 24

TABLE OF AUTHORITIES CITED

Cases	Page
Barbed Wire Patent case, 143 U. S. 275	18
Cashman v. Mason, 166 F. 2d 693	22
Folsom v. Marsh, 9 Fed. 342	23, 24
Graver Tank and Manufacturing Company v. Linde Air Products Company, 336 U. S. 271	23
Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Company, 49 N. E. 872	21
Werckmeister v. American Lithographic Company, 134 Fed. 321	23
Wittmayer v. United States, 118 F. 2d 808	22

Statutes	
Copyright Statutes (17 U. S. C. A.)	5
Federal Rules of Civil Procedure, Rule 52(a)	2, 5, 7, 8, 22, 23
United States Code Annotated, Title 28, Sec. 1254(1)	11
United States Code Annotated, Title 28, Sec. 2101(c)	11

IN THE

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No.....

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Petitioners,

vs.

HARWOOD A. WHITE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Supreme Court of the United States:

Your Petitioner, Susan C. Kimmell, respectfully shows:

I.

Summary Statement of the Matter Involved.

This matter involves two literary properties. One property is in manuscript form and the other is a copyrighted, published book based on the manuscript. Your Petitioner takes the position that she is the absolute owner of the manuscript and has the common-law right of first publication. She is also holder of the statutory copyright on the book, her statutory rights stemming from her former common-law rights in and to the material therein. The Respondent, as a member of the

general public, takes the position that the manuscript was abandoned and dedicated to the general public before the publication of the book, and that he has the right to use the material in both properties. The stand of the Respondent is explained by his allegation that he is in the process of writing a book based upon the manuscript, and proposes to quote from the manuscript and the book [R. 7]. The issue posed is as to whether or not the manuscript is in the public domain. The answer to that question, of course, determines the validity of the copyright on the book.

II.

Basis for Jurisdiction of This Court.

Your Petitioner contends that this Court has jurisdiction to review the judgment below of the United States Court of Appeals for the Ninth Circuit, which reversed the judgment below of the United States District Court for the Southern District of California, on two grounds as follows:

(a) This matter involves the validity of her copyright on the book mentioned above.

(b) The Court of Appeals having determined that the findings of fact are not justified by the evidence [R. 237-238] and that the trial court disregarded in large part the testimony of White's secretary (W. M. Maguire) and Mrs. Oettinger [R. 242], there is a question as to whether or not the findings of fact are clearly erroneous within the meanings of Rule 52(a), Rules of Civil Procedure, 28 U. S. C. A., and whether or not due regard was given by the Court of Appeals to the opportunity of the trial court to judge of the credibility of these two witnesses as required by that Rule.

III.

History of the Literary Properties Involved.

The late Stewart Edward White, noted author of The Long Rifle, Folded Hills and many other books of adventure fiction, during a period of time between the 1920s and the 1930s, compiled a manuscript entitled "Gaelic" or "Old Gaelic." The material therein was received by him psychically, and was of a metaphysical or philosophic nature.

Beginning in the early 1930s, White made or caused to be made mimeographed copies of the Old Gaelic manuscript which were available to certain persons. He also permitted Margaret Oettinger (a witness for the Respondent as hereinafter mentioned) and Ivy Duce (a witness for your Petitioner as hereinafter mentioned) to make and distribute mimeographed copies. None of the copies was placed in a public or lending library or in a retail bookstore where the general public, without discrimination as to persons, could have access thereto [R. 74, 101, 146, 173, 187-188, 213].

Subsequently, White reorganized some of the material in the Old Gaelic manuscript and rewrote it in manuscript form which he designated as "The New Gaelic" or "The Job." [R. 5, 163].

By a bill of sale, dated October 20, 1944, White sold and transferred to your Petitioner the Old Gaelic manuscript and the New Gaelic or The Job manuscript, "with the right to publish or otherwise use said manuscripts in any way which she in her sole judgment shall determine."

Subsequent to the death of Stewart Edward White in 1946, your Petitioner entered into a contract, dated

September 8, 1947, with E. P. Dutton and Company, Inc., for the publication of the New Gaelic or The Job manuscript in book form under the title "The Job of Living." The book was copyrighted by your Petitioner in 1948, which copyright was registered as provided by law. The book was made available for purchase by the general public.

IV.

Statement Covering the Litigation.

The position of your Petitioner with reference to the Old Gaelic manuscript is that she is to guard it and that she is not allowed to publish it, because of instructions from Stewart Edward White [R. 170]. Her purpose in pursuing the defense of this action is to prevent its being published by anyone else.

The Respondent, who is a brother of Stewart Edward White [R. 60], appears in the litigation as the Plaintiff and Appellant below, and your Petitioner appears as the Defendant and Appellee below. The action was brought in the District Court of the United States for the Southern District of California. E. P. Dutton and Company, Inc., a corporation was named one of the Defendants, but at the trial was dismissed as a party to the action [R. 56], leaving your Petitioner as sole party Defendant. The action was for declaratory judgment as to the right of the Respondent to quote from the manuscript and book. The Respondent, in his Complaint [R. 3-9], contended that the Old Gaelic manuscript had been dedicated to the general public by reason of its distribution to various persons. Your Petitioner, in her Answer [R. 10-15], admitted a limited distribution, only to friends and to persons particularly inter-

ested in the metaphysical philosophy of Stewart Edward White as set forth in the manuscript, and that it was therefore a limited publication, without loss of her common-law rights. The jurisdiction of the District Court was invoked under Copyright Statutes, 17 U. S. C. A. The case was tried without a jury in November, 1950, before the Hon. Leon R. Yankwich.

Your Petitioner testified in Court in her own behalf [R. 149-175], and the Respondent testified in Court in his own behalf [R. 60-78].

The additional witnesses for your Petitioner were Ivy Duce, whose testimony was presented by deposition [R. 178-199], and Don E. Stevens, whose testimony was presented by deposition [R. 202-224].

The additional witnesses for the Respondent were W. N. Maguire, who testified in Court [R. 79-103], Margaret Oettinger, whose testimony was presented by deposition [R. 107-136], and Harriet W. Jones, whose testimony was presented by deposition [R. 139-147].

The trial Judge filed his memorandum opinion holding that the Gaelic manuscripts were not in the public domain; that your Petitioner was their sole owner; and that the Respondent be enjoined from using them [R. 16-40].

As required by Rule 52(a), Rules of Civil Procedure, 28 U. S. C. A., the trial Judge made and filed his Findings of Fact and Conclusions of Law [R. 40-46]. In substance, the Findings were that 75 copies of the Old Gaelic manuscript were made by mimeograph; that such copies were distributed to friends and to persons particularly interested in the subject matter, but were not made available to the general public; that the distribution of the manuscript was a limited, qualified, and private

publication, and not a general publication; that your Petitioner was entitled to judgment and declaration that the "Old Gaelic" and the "New Gaelic" or "The Job" manuscripts were not in the public domain; that your Petitioner was the sole owner of both manuscripts and of the book, "The Job of Living"; and that your Petitioner was entitled to have the Respondent enjoined from using or quoting from the manuscripts and the book.

In compliance with the opinion and findings, judgment and declaration in favor of your Petitioner was made and filed [R. 47-49].

The Respondent appealed from the judgment to the United States Court of Appeals for the Ninth Circuit on the sole question as to whether or not the evidence supported the findings of fact.

The Court of Appeals filed its opinion holding that the findings were not justified by the evidence [R. 237-238].

A timely Petition for Rehearing was presented to the Court of Appeals by your Petitioner, and a Reply thereto was presented by the Respondent. The Petition for Rehearing was denied without opinion.

V.
The Question Presented.

The sole question presented in this matter is: Does the testimony adduced at the trial show a limited, qualified, and private circulation of the Gaelic manuscript among friends of the author, Stewart Edward White, and persons particularly interested in the subject matter thereof; or, does the testimony show a general publication of the manuscript, so that any member of the general public, without discrimination as to persons, would have an opportunity of access thereto?

VI.

Reasons for Allowance of Writ.

The discretionary power of this Court is invoked on the following grounds:

(1) The decision of the Court of Appeals for the Ninth Circuit is contrary to the provisions of Rule 52(a), Federal Rules of Civil Procedure, 128 U. S. C. A., in that it sets aside the findings of fact which are not clearly erroneous within the meaning of that Rule, substituting its own factual findings derived from the conflicting testimony of the witnesses, without due regard to the opportunity of the trial Court to pass on the credibility of these witnesses.

(2) The Court of Appeals in its Opinion has disregarded Rule 52(a) for the reasons set forth in paragraph (1) above.

(3) The decision of the Court of Appeals is in conflict with the decisions of this Court holding that findings of fact shall not be set aside unless clearly erroneous within the meaning of Rule 52(a), and that it is the province of the trial Court to judge of the credibility of witnesses.

(4) The decision of the Court of Appeals is in conflict with other decisions of the same Court and with the decisions of other United States Courts of Appeal for the reasons set forth in paragraph (3) above.

(5) A review of the entire evidence does not show that a mistake was made by the trial Court.

VII.
Conclusion.

As is well known to this Court, the policy of the law is to protect the rights of an author by permitting him the restricted sharing of the products of his mind with others, for the purpose of encouraging the development and fruition of such ideas.

It is clear from the evidence adduced at the trial of this matter that Stewart Edward White never made a clear, decisive, unmistakable, and unequivocal dedication of the Old Gaelic manuscript to the general public. It is submitted that the decision of the Court of Appeals for the Ninth Circuit, based on evidence which the trial Court disbelieved, sets a dangerous precedent. The danger of this precedent is in its tendency to break down the established policy of the law.

Furthermore, the problem presented by the failure of the Court of Appeals to observe Rule 52(a) is of no little importance, since applications of this rule frequently arise in general practice before the several Courts of Appeal. A practice of disregarding this rule would have the ultimate effect of nullifying its salutary purposes and setting up the various Courts of Appeal as fact-finding bodies acting without benefit of witnesses appearing before them.

WHEREFORE, your Petitioner prays that this Petition for a Writ of Certiorari be granted, and that the judgment of the Court of Appeals for the Ninth Circuit be reversed.

Dated this 18th day of April, 1952.

Respectfully submitted,

FORD W. HARRIS,
Attorney for Petitioner.

LESLIE F. KIMMELL,
Of Counsel.

Certificate of Counsel.

It is my judgment that this Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is well founded and is not interposed for delay.

FORD W. HARRIS.

IN THE

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No.....

SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY, INC., a Corporation,

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vs.

HARWOOD A. WHITE,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Sections 1254(1) and 2101(c).

II.

Dates of Opinions, Judgments, and Petition for Rehearing Below.

The Opinion of the District Court was filed December 6, 1950 [R. 16-40], 94 Fed. Supp. 502.

The Judgment of the District Court was entered December 27, 1950 [R. 47-49].

The Opinion of the Court of Appeals for the Ninth Circuit was filed January 7, 1952 [R. 236-244].

The Judgment of the Court of Appeals was entered January 7, 1952 [R. 245].

A Petition for Rehearing to the Court of Appeals was denied February 21, 1952 [R. 246].

III.
Argument.

At the trial of this cause three persons testified in open Court, namely: the Respondent [R. 60-78], W. N. Maguire [R. 79-103], and your Petitioner [R. 149-175]. Four persons testified by deposition, namely: Margaret Oettinger [R. 107-136], and Harriet W. Jones [R. 139-147] on behalf of the Respondent; Ivy Duce [R. 178-199] and Don E. Stevens [R. 202-224] on behalf of your Petitioner.

To support its holding that the findings of fact were not justified by the evidence, the Court of Appeals for the Ninth Circuit makes, among others, the following points in its Opinion:

Point (1) That Stewart Edward White did not, in his correspondence or otherwise, place any limitation on the persons among whom copies of the manuscript might be circulated by Margaret Oettinger [R. 239]; that, on one occasion, when the Gaelic manuscript was discussed, he told her that he had no objections to additional copies being made, and no limitations were placed upon the amount to be charged or to whom the manuscript was to be sold; that it was understood that the charge was to cover the cost of materials [R. 240]; and that her testimony is unequivocal that there was no limitation on the persons to whom copies would go [R. 242].

In connection with the above Point (1), it should be noted that Oettinger testified that a personal interview with Stewart Edward White in 1940 or 1941 [R. 127] gave her permission to make mimeographed copies of the manuscript; that she knew two or three people who wanted copies; that she said he knew several people who would like copies; and that he gave her, from time to time, the names of people who would like copies [R. 108-109]; that in the discussion she and White had about the manuscript she "* * * made some kind of remarks about, 'Of course, we will just mimeograph it and distribute it at—or to friends,' or something like that. 'Give these people that want copies.' It wasn't—the whole thing was so informal that it is hard to remember even."; that there was no restriction as to whom she could give or sell copies of the manuscript [R. 110, 117, 119]; that she received a letter from White dated May 18, 1945 (set out as a footnote R. 242); that she had a letter from White in 1942 or 1943, giving her permission to give the mimeograph stencils for the manuscript to Mrs. Duce [R. 119-120].

In connection with the foregoing testimony by Oettinger, attention is called to a letter written by White to your Petition in 1940, on the day following his conversation with Oettinger about the manuscript (set out as a footnote R. 239), in which he states that he approves of Oettinger's making mimeographed copies of the Gaelic manuscript to be passed around "* * * among *such of their friends* who want copies," at the *"exact cost" of reproduction.* (Emphasis added.)

Putting the testimony of Oettinger together with the foregoing letter, we have White giving her permission to distribute copies of the manuscript to two or three

of her friends who wanted them, and sending her names, from time to time, of people who would like to have copies.

Nowhere in Oettinger's conversations and correspondence with White is there any indication that he gave her, in positive language, express permission in so many words to distribute the manuscript indiscriminately to the general public, saying he had given up his rights in it. On the contrary, she admits limitations which is corroborated by the contemporaneous letter dated in 1940. The trial Judge stresses this point in his Opinion [R. 24-26, 131], while the Court of Appeals, in its Opinion, construes such evidence to indicate that White gave Oettinger permission to pass the manuscript around indiscriminately to members of the general public up all his rights in it [R. 239 and 242].

An examination of Oettinger's testimony as a whole reveals a vague, confused, and contradictory state of mind which may be explained by the fact that the events had occurred many years previously and she no longer had a clear recollection of them. Moreover, she was obviously making an effort to say what was expected of her.

Point (2) That no restriction or limitation was placed on the use that Harriet W. Jones could make of the copies of the manuscript which she received from Oettinger [R. 240].

In connection with the above Point (2) it should be noted that Jones testified that she had known Stewart Edward White all her life [R. 139]; that she got three copies of the Old Gaelic manuscript from Oettinger for herself and her family for $2.00 each [R. 142]; that it was her understanding or supposition that $2.00 "* * * would be an adequate amount to make the book pos-

sible" [R. 145]; and that when she received the copies, no restrictions were placed on the use she could make of them [R. 143].

Here again is a witness who seems disposed to give the answers expected of her; and again the Court of Appeals is confused in taking her statements that no restrictions were placed on her to mean that she had *carte blanche* to make general distribution [R. 240]; furthermore, the Court of Appeals in holding "She sent the volumes to people who asked her for them" [R. 240], overlooks the fact that she received only *three* copies of which one went to herself and two to members of her immediate family [R. 142].

Point (3) That the trial Judge disregarded in large part the testimony of the witness Maguire (referred to as "White's secretary"), and made no mention of White's letter of transmittal testified to by her [R. 242].

In connection with this Point (3) it should be noted that Maguire testified that she made a number of mimeographed copies of the Gaelic manuscript with blue covers by instructions from Stewart Edward White [R. 81]; that it was her best recollection she mailed out some 45 to 55 copies at various times [R. 90] to a list of names given her by White [R. 82-83]; that with each copy mailed out she sent a letter of transmittal dictated by White, the first paragraph of which was the same in each case [R. 85]; that since no copy was available, Maguire quoted the contents from memory as follows:

> "I have finally made some extra copies of 'Gaelic' because so many of you wanted them, and herewith is your copy. I am glad to know of your interest, and I wish you to read it, to use it as you like, and

> pass it on to others, and for as long a time as you can. If you get through with it, you might return it to me, to hand to someone else. Otherwise you are at liberty to keep it" [R. 85];

that the matter of arrangements White and Oettinger for the making of mimeographed copies of the manuscript by Oettinger was handled by correspondent [R. 92-93]; that White did not, in his letters to Oettinger, place upon her any limitation or restriction as to whom she might circulate the copies that were to be made by her [R. 94].

By referring to the testimony of the Respondent, it appears that mimeographed copies of Gaelic were first sent out by Stewart Edward White in 1933, since Respondent testified that Stewart Edward White produced the Gaelic manuscript in its present form in 1933 and that he received such a copy with a blue cover, along with a letter which he did not keep [R. 63-64]. From this we infer that the purported letter of transmittal, quoted from memory, was written some 17 years prior to the time of the trial.

Your Petitioner begs leave to emphasize the fact that no copy of the purported letter of transmittal was produced at the trial; that it was written in 1933, seventeen years previously, that it was quoted from memory by the Witness Maguire [R. 85] and that the Respondent stated the substance of its contents from memory [R. 64]. Yet it is upon such evidence as to the contents of the letter the Court of Appeals relies heavily in overruling the judgment of the trial Court.

Referring to the testimony of Oettinger that the arrangements with White to make copies of the manu-

script was at a personal interview [R. 108] and to the letter written in 1940 by White to your Petitioner [footnote R. 239] and to the testimony of Maguire that the arrangements between White and Oettinger were made by correspondence [R. 92-93], we are compelled to recognize that these two witnesses contradict each other. The letter written in 1940, being a contemporaneous document, shows that Maguire's memory was not to be relied upon. Yet the Court of Appeals complains that the trial Court made no mention of the purported letter of transmittal [R. 242]. The answer is he doubted the accuracy of Maguire's memory, and in view of her inability to testify accurately as to other contemporaneous facts questioned her credibility as to the contents of the purported letter of transmittal.

Point (4) That the trial Judge disregarded in large part the testimony of the witness Oettinger [R. 242].

In connection with this Point (4) the salient parts of the testimony of Oettinger are set forth in Point (1) above.

In addition her testimony shows she believed some of the material in the Gaelic manuscript was received by Mrs. White [R. 126] (Mrs. White or "Betty" was the wife of Stewart Edward White [R. 63]). Yet the Respondent testified that the material in the manuscript came through his brother, Stewart Edward White [R. 63]. Your petitioner testified to the same effect [R. 153]. Ths shows that as to the source of the material Oettinger was confused or surmising. The question follows: on how many more matters was she confused or surmising?

The trial Judge, after referring to the testimony of Oettinger that she "knew two or three people who wanted copies" [R. 109], states:

> "While the witnesses sought to give the impression that she was given *carte blanche* to reproduce and distribute at will, the excerpt just quoted shows strictly the limitations which were imposed."

The conclusion is inescapable that in evaluating the testimony of Oettinger, the trial Court took into consideration the vagueness and confusion of her testimony, and her tendency to say what was expected of her.

In the *Barbed Wire Patent* case, 143 U. S. 275, 284, it is said:

> "Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves, are not usually to be depended upon for accurate information."

Point (5) That Stewart Edward White is not pictured as a man with a message [R. 243].

The testimony of your Petitioner at the trial as to the number of books on metaphysical subjects written by Stewart Edward White is pertinent to this Point (5):

> "Q. Can you list the number of books on metaphysical subjects which Stewart Edward White has written? A. There were ten altogether: 'Credo,' 'Why Be a Mud-Turtle,' 'The Betty Book,' 'Across the Unknown,' 'The Unobstructed Universe,' 'The Road I Know,' 'Anchors to Windward,' 'The Stars Are Still There,' 'With Folded Wings,' and 'The Job of Living.'" [R. 152.]

There is also pertinent testimony of the Respondent on this point:

> "Q. Do you know whether he undertook to disseminate this philosophy to others? A. He devoted his entire time to it, after his wife died." [R. 69.]

It is earnestly submitted that a man who has written ten books on metaphysics and who devoted his entire time in the latter part of his life to disseminating his philosophy to others was, most decidedly, a man with a message and as such would have a following of persons particularly interested in his philosophy.

Point (6) That the testimony of Ivy Duce and Don E. Stevens (witnesses for your Petitioner) related to a time not earlier than 1943; that their testimony, together with that of your Petitioner, related entirely to their own activities and their own relations with Stewart Edward White; that none of it purported to have any bearing on the Oettinger publication or on the publication of the author himself [R. 241].

In connection with this Point (6) it should be noted that your Petitioner testified that in the Spring of 1941 she discussed with Stewart Edward White the arrangement which he had made with Oettinger; that "He felt her to be a woman of discretion and he could trust her not to broadcast the copies generally, but to use care as to the people to whom she gave them" [R. 158-159]. This testimony should be considered in the light of the letter written in 1940 by White to your Petitioner (footnote, R. 239) in which he approved Oettinger's passing around copies "* * * among such of their friends who want copies."

It is suggested that, so far as your Petitioner is concerned, the foregoing shows that there is a part of her testimony which does relate to the Oettinger publication. It also shows that White believed Oettinger to be a woman of discretion whom he could trust to use care as to the people to whom she gave copies. The extent to which he relied on her discretion is shown in the letter written by White to Oettinger in 1945 (set out as a footnote R. 242) in which he states, "You may go ahead *at your discretion* with more copies of it." (Emphasis added.)

There is also testimony by your Petitioner and by Don E. Stevens bearing on the publication by White himself. Your Petitioner testified that "He told me that this was not to be published, that he wanted it guarded very carefully and shown only to people who were particularly interested in the subject matter * * * whose discretion could be relied on, who would not copy any portions of it or produce any portions for publication [R. 158-159]. Stevens testified that White was acting under positive instructions from the "Invisibles" "to run no chances of (its) getting out to the general public" [R. 210].

In this connection the question arises, is it reasonable to suppose that Stewart Edward White would impose strict limitations on your Petitioner, on Ivy Duce [R. 185] and on Stevens and not impose the same restrictions upon himself and Oettinger? The only inference that can be drawn is that he was consistent in imposing the same limitations on everyone concerned, including himself.

Point (7) That the words, "provided," of course, it is not in published form," appearing in the letter written in 1945 by White to Oettinger (set out as Note 5 in the Opinion) could only mean in book form [R. 244].

In connection with this Point (7) it should be noted, in view of the overwhelming weight of the testimony referred to above showing that, White put definite restriction on the publication of the Gaelic manuscript, that therefore these words "in published form" should be taken to mean that "* * * he was determined that the permission granted did not result in a general publication" as expressed in the Opinion of the trial Judge [R. 31], and not "only in book form" as stated in the Opinion of the Court of Appeals.

Point (8) That the Record clearly shows that at least as many as 200 copies of the manuscript were put into unrestricted circulation over the long period of time between 1933 and 1946, and that through how many hands they passed among members of the general public can only be surmised [R. 244].

In connection with this *Point (8)* it should be noted that if the Court of Appeals is referring to an unauthorized use made of copies of the manuscript by persons receiving them with restrictions, such unauthorized acts are not chargeable to the author. "The act of publication is the act of the author, and cannot be dependent upon the act of the purchaser," *Jewelers' Mercantile Agency v. Jewelers' Weekly Publishing Company,* 49 N. E. 872.

It may be noted, in passing, that the discrepancy between the figure of 75 copies of the manuscript distributed, as fixed in the Findings of Fact [R. 43], and the figure of 200 copies mentioned in the Opinion of the Court of Appeals [R. 244], can be accounted for by the fact that the trial Judge probably discounted the testimony of the witness Maguire who claimed to have distributed about 55 copies [R. 90], and also discounted the testimony of

the witness Oettinger who was vague as to the number of copies that she distributed [R. 131-133].

Having in mind the fact that matters involving the application of Rule 52 (a) have been frequently before this Court, it is obvious that it would not be helpful to cite a multiplicity of cases. However, as an example of how the decision of the Court of Appeals for the Ninth Circuit in the instant case is in conflict with other decisions of the same Court, attention is called to *Wittmayer v. United States* (9 Cir.), 118 F. 2d, 808, 811, where the following statement occurs:

> "As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U. S. 350, 353, 61 L. Ed. 356 (citing Davis v. Schwartz, 155 U. S. 631, 636, 39 L. Ed. 289) the case is preeminently one for the application of the practical rule that so far as the findings of the trial Judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of the witnesses, or so far as there is any testimony consistent with findings, it must be treated as unassailable.' "

An example of the conflict with other United States Courts of Appeal occurs in *Cashman v. Mason* (8 Cir.), 166 F. 2d 693, 696 where it is held as follows:

> "And in considering whether the findings of the district court were clearly erroneous, appellees on this appeal must be given the benefit of all favorable inferences which reasonably may be drawn from the evidence."

And as an example of the conflict between the decision in the instant case and the decision of a case in this Court, the language in *Graver Tank and Manufacturing Company v. Linde Air Products Company,* 336 U. S. 271, 275, is pertinent. After quoting Rule 52(a) this Court said:

> "The rule requires that an Appellate Court make allowance for the advantages possessed by the trial Court in appraising the significance of conflicting testimony, and reverse only 'clearly erroneous' findings."

It is respectfully suggested to this Court that the only sound rule to be followed in determining whether or not there has been a general publication of the product of his mind by an author is the rule laid down in *Folsom v. Marsh,* 9 Fed. Cases 342, 345-346, decided more than 100 years ago, where, in an opinion by Judge Story, it is said:

> "Unless, indeed, there be a most unequivocal dedication of private letters and papers by the author either to the public or to some private person, I hold that the author has a property therein, and that the copyright thereof belongs exclusively to him."

To the same effect, see:

> *Werckmeister v. American Lithographic Company* (2 Cir.), 134 Fed. 321, 325.

It is earnestly submitted that the evidence in this case does not show an unequivocal relinquishment to the general public by Stewart Edward White of his rights in the Old Gaelic manuscript.

IV.
Conclusion.

Because of the vast and increasing volume of creative literary productivity, the question of what constitutes publication, general or limited, is of far wider significance today than in 1841 when the case of *Folsom v. March* was before this Court. The instant case presents a unique opportunity to reaffirm the rule in the *Folsom* case.

Respectfully submitted,

FORD W. HARRIS,
Attorney for Petitioner.

LESLIE F. KIMMELL,
Of Counsel.

SUBJECT INDEX

PAGE

I.

Preliminary statement 1

II.

Facts 2

III.

The law 3

IV.

Argument 4

AUTHORITY CITED

RULES PAGE

Rules of the Supreme Court, Rule 38, Subd. 5 ..... 1, 2

IN THE

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SUSAN C. KIMMELL and E. P. DUTTON AND COMPANY, INC.,

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HARWOOD A. WHITE,

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.
Preliminary Statement.

A cursory appraisal of Petitioner's Petition for a Writ of Certiorari and Brief in Support Thereof demonstrates that this cause falls far short of meeting the requirements of subdivision 5 of Rule 38 of the Supreme Court. Economically the matter is of small importance and in respect to the law there is no dispute whatever, the Court of Appeals adopted the Trial Court's opinion relating to the law of limited publication [R. p. 241]. The evidence is not in conflict [R. p. 238] and the sole question presented on this appeal is whether or not the evidence sup-

ports findings and judgment to the effect that there has not been a general publication of the Old Gaelic manuscript by the author prior to the claim of copyright by Petitioner made after the author's death. The Trial Court felt that such findings and judgment were supported, the Appellate Court felt that they were not. Such a dispute hardly falls within either the letter or intent of Section 5 of Rule 38.

II.
Facts.

The Findings of Fact filed by the Trial Court [R. pp. 40 *et seq.*] recite little factual matter and are largely made up of conclusions.

The opinion of the Trial Court is divided into two parts: (1) a brief summary of the law [R. pp. 19 to 24] with which no one quarrels, (2) an attempt to fit the law to the evidence which goes far afield and with which both Appellant and the Appellate Court sharply disagreed. The point of disagreement is not whether or not the manuscript was published in the manner contended by the author and by others with his consent, but rather is confined to the single question of whether or not there were any limitations placed by the author on the purposes for which it was published or on the persons to whom it was admittedly published. The Appellate Court very fairly summarizes the factual situation in its opinion [R. pp. 236 *et seq.*]. We will not burden this brief with an elaborate statement of facts. Suffice it to say that Peti-

tioner claims the only limitation on the publication was that it was to "friends" or to "persons particularly interested in the subject matter." Petitioner does not claim that the term "friends" means friends of the author and by the author's declarations in evidence, the term includes friends of his friends [R. p. 238], it also includes friends of an indefinite group of people in Palo Alto [R. p. 239, footnote 2]. Both sides disclaim that there was any organized group to which distribution was limited and the only qualification necessary to constitute one "particularly interested in the subject matter" was sufficient interest to request a copy. Incidentally the subject matter is a general philosophy of living. The work is not technical and its circulation without claim of copyright continued for more than thirteen years. Respondent has never suggested any purpose connected with the circulation of the work and none is discernible from the record except a desire to have people read it.

III.
The Law.

Appellant, Respondent herein, adopts, as did the Appellate Court, the summary of the law expounded by the Trial Court [R. pp. 19 *et seq.*].

IV.
Argument.

The vociferous protestations of Petitioner, notwithstanding the Appellate Court did not violate Rule 52A, it merely applied the fundamental, familiar and ancient rule that a judgment must be supported by the evidence. No conflict whatever exists in respect to the existence of the rule or the duty of the Appellate Court to apply it. No conflicts in the application of the rule appears in the Petition or the brief in support thereof. The unimpeached and uncontradicted evidence in this cause showed that between two and three hundred bound copies of "Old Gaelic" had been made and distributed by sale and by gift to members of the general public without limitation on who might receive a copy, without limitation on the use the recipient might make of the copies and without purpose other than to publish. The Appellate Court felt constrained to hold that there had been a general publication and a gift of the manuscript to the public. The case is not only of no general importance but patently has been correctly decided.

Wherefore, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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